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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOSE GERARDO SAAVEDRA, JR., Appellant.	2 CA-CR 2009-0077 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20082491

Honorable John S. Leonardo, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Jose Saavedra was convicted of possession of a narcotic drug for sale and possession of drug paraphernalia. On appeal, he contends the trial court erred by denying his motion for judgment of acquittal.[1] For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 On June 26, 2008, Tucson police officer Oscar Cuellar was assigned to the Community Response Team (CRT) and was conducting plainclothes surveillance in an area of Tucson known for high drug activity. Between 4:00 and 5:00 p.m., he observed a pickup truck pull into the parking lot of a market directly across the street from where he was. The occupants remained inside in the vehicle, and a few minutes later, a silver Oldsmobile pulled into the parking lot and stopped next to the pickup truck. Cuellar watched as a passenger of the truck got out and "ma[de] contact with the passenger of the silver Oldsmobile," who was later identified as Saavedra. The truck passenger pulled something from his pocket and handed it to Saavedra. Saavedra then handed something to the truck passenger, who placed the item in his pocket and returned to the truck. The exchange took less than a minute, and both vehicles left immediately afterward.

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[1]Although Saavedra also contends the trial court erred in denying his motion for new trial, we find no record that such a motion was filed. We therefore do not address this argument on appeal.

¶3 Another CRT officer driving an unmarked vehicle assisted Cuellar in following the Oldsmobile. When that officer saw the Oldsmobile fail to stop at a stop sign, he radioed for a third CRT officer driving a marked patrol car to perform a traffic stop. After being stopped, the driver of the Oldsmobile consented to a search of the vehicle. In the passenger compartment of the car, officers discovered a ziplock bag "in between the fire wall and the center console." Inside that bag, they found twelve smaller baggies containing approximately equal amounts of a powdered substance later determined to be cocaine weighing a total of 39.7 grams.

¶4 Saavedra and the driver were both arrested and charged with one count each of possession of a narcotic drug for sale and possession of drug paraphernalia. The jury found Saavedra guilty of both charges and further found the aggregate weight of the cocaine exceeded the "threshold amount" of nine grams for sentencing purposes.[2] *See* A.R.S. § 13-3401. The trial court sentenced him to a substantially mitigated prison term of three years for possession of a narcotic drug for sale and to a concurrent, mitigated term of six months for possession of drug paraphernalia. This appeal followed.

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[2]Section 13-3408(D), A.R.S., provides that, if the aggregate amount of narcotic drugs involved equals or exceeds the statutory threshold amount, a person convicted of possessing a narcotic drug for sale under § 13-3408(A)(2) is not eligible for probation and must serve all of the prison sentence imposed by the court.

Discussion

¶5 At the close of the state's case, Saavedra moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., arguing there was no substantial evidence to connect him to the sale of drugs or, for that matter, to the drugs themselves. Saavedra argues the trial court erred in denying the motion.

¶6 We will not disturb a trial court's denial of a Rule 20 motion absent an abuse of its discretion. *State v. Leyvas*, 221 Ariz. 181, ¶ 33, 211 P.3d 1165, 1175 (App. 2009). A trial court has discretion to grant a judgment of acquittal pursuant to Rule 20 only when no substantial evidence supports a conviction. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). Substantial evidence is defined as proof that a reasonable jury could accept as sufficient to support a conclusion that a defendant is guilty beyond a reasonable doubt. *Id.* In determining the sufficiency of the evidence on review, we view the facts and all reasonable inferences therefrom in the light most favorable to upholding the jury's verdict. *State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998).

¶7 To sustain a conviction for possession of a narcotic drug for sale, the state needed to prove Saavedra knowingly possessed a narcotic drug and possessed the drug for sale. *See* A.R.S. § 13-3408(A)(2). And a person commits the crime of possessing drug paraphernalia by possessing, "with intent to use, drug paraphernalia to . . . pack, repack, store, [or] contain . . . a[n illegal] drug." A.R.S. § 13-3415(A). The term "possess" is defined by statute as "knowingly to have physical possession or otherwise to exercise

dominion or control" over the contraband. A.R.S. § 13-105(33). And, "[t]o satisfy these statutory elements, the State must prove, among other things, 'either actual physical possession or constructive possession with actual knowledge of the presence of the narcotic substance'" and the drug paraphernalia. *State v. Teagle*, 217 Ariz. 17, ¶ 41, 170 P.3d 266, 276 (App. 2007), *quoting In re Maricopa County Juv. Action No. J-72773S*, 22 Ariz. App. 346, 348, 527 P.2d 305, 307 (1974). The trial court properly instructed the jury that constructive possession occurs when "the defendant does not actually possess an object, but knowingly has the power and the intention to exercise dominion or control over it either acting alone or through another person." *See State v. Cox*, 217 Ariz. 353, ¶ 11, 174 P.3d 265, 267 (2007).

¶8 Saavedra argues the state presented no evidence that he had knowledge or possession of the drugs. He points to Cuellar's testimony that Cuellar could not see what had been passed between Saavedra and the truck passenger. And, Saavedra maintains, "[w]ithout any evidence of what was allegedly passed between [him] and the truck passenger[,] the fact that drugs were found in the car at a later time is not evidence that . . . Saavedra possessed those drugs." Indeed, the mere presence of a person at a location where narcotics are found is insufficient to establish the person knowingly possessed or exercised control over the drugs or paraphernalia. *Teagle*, 217 Ariz. 17, ¶ 41, 170 P.3d at 276. However, there was ample evidence here for the jury to conclude Saavedra was more than merely present.

¶9 After the court denied his Rule 20 motion at the conclusion of the state's case, Saavedra testified. "In so doing, he took the risk of supplying any missing evidence in the State's case." *Teagle*, 217 Ariz. 17, ¶ 43, 170 P.3d at 277, *citing State v. Nunez*, 167 Ariz. 272, 279, 806 P.2d 861, 868 (1991) ("A defendant who goes forward and presents a case waives any error if his case supplies the evidence missing in the state's case."). Saavedra stated that, when the truck passenger, whom he had never met, approached his side of the Oldsmobile, Saavedra merely shook his hand. Saavedra also testified the truck passenger had dropped a fifty-dollar bill in Saavedra's lap, and the driver of the Oldsmobile, Saavedra's cousin, had reached over and picked it up. Saavedra stated his cousin then reached across Saavedra and handed the truck passenger a "baggie" of cocaine. He testified that the baggie "was in a big bag" and, when shown a photograph of the larger ziplock bag, Saavedra stated the baggie "was probably one of the smaller bags that's inside this zip-lock bag." Therefore, if there was any missing evidence about the nature of the "contact" Cuellar had witnessed, Saavedra supplied it through his testimony.

¶10 The trial court also instructed the jury on accomplice liability. To find Saavedra guilty as an accomplice, the jury need only have found that he had aided, solicited, facilitated, or commanded another to commit the offense. *See* A.R.S. §§ 13-301, 13-303. Although Saavedra disputed his involvement in the drug transaction, Cuellar testified he had observed the truck passenger hand something to Saavedra and Saavedra hand something to the truck passenger. Although circumstantial, this evidence allowed the jury reasonably to

infer that, at a minimum, Saavedra "aided" his cousin in committing the offense by taking the money from the truck passenger and handing him the cocaine. "[T]he verdict indicates that the jury found [Cuellar's] testimony regarding the events more credible than [Saavedra]'s. 'No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.'" *Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d at 269, *quoting State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974); *see also State v. Lehr*, 201 Ariz. 509, ¶ 24, 38 P.3d 1172, 1180 (2002).

¶11 The verdict also indicates the jury rejected Saavedra's contentions that he did not know that his cousin was involved in selling drugs, that there were drugs in the car before he and his cousin had driven to the parking lot, or that they had gone there to conduct a drug transaction. Thus, there was substantial evidence to support the jury's verdicts beyond a reasonable doubt that Saavedra had knowingly possessed a narcotic drug for sale and drug paraphernalia. The trial court did not abuse its discretion in denying Saavedra's Rule 20 motion.

Disposition

¶12 For the reasons stated above, we affirm Saavedra's convictions.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge